Petition

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No.

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IN THE

Supreme Court of the United States

October Term, 1981

JACK E. BRONSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the mail fraud statute, 18 U.S.C. § 1341, is so broad as to criminalize an attorney's conduct in representing a private client with interests adverse to those of another client of his large law firm, when such claimed fiduciary breach involves no misuse of confidential information and results in no injury to the firm's client.

2. Whether upon a trial for mail fraud, in which evidence has been adduced showing a lawyer-legislator to have advocated a position adverse to the interests of a client of his large law firm, it was appropriate to exclude evidence on the issue of his criminal intent that showed the bona fides of his position as a public official.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Jack E. Bronston, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 19, 1981, affirming the judgment of conviction against him in the Southern District of New York on both counts of a two-count indictment charging mail fraud.

Opinions Below

On August 19, 1981 the Court of Appeals for the Second Circuit affirmed a judgment of conviction against petitioner, and rendered an opinion appearing at 658 F.2d 920. *See* Appendix A, *infra,* at 1a.* Thereafter, on November 4, 1981, it denied, without opinion, a Petition for Rehearing or, Alternatively, for Rehearing In Banc. *See* Appendix C, *infra,* at 33a.

Previously, a Judge of the United States District Court for the Southern District of New York had denied petitioner's motion to dismiss, rendering an opinion that the indictment against petitioner adequately set forth the elements of the offense intended to be charged. Said opinion is officially reported at 491 F. Supp. 593, and is included in this petition as Appendix E, *infra,* at 37a. After a jury trial before the same Judge, a judgment of conviction was entered on January 2, 1981. *See* Appendix D, *infra,* at 35a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 19, 1981 (31a). A Petition for Rehearing or, Alternatively, for Rehearing In Banc was denied by the Court of Appeals on November 4, 1981 (33a). Petitioner timely applied for an Extension In Which to File a Petition For Writ of Certiorari which was granted on December 28, 1981 to and including February 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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* "——a" indicates page references in this petition's appendix, *infra.*

Constitutional Provision and Statute Involved

The Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The statute under which petitioner was prosecuted was 18 U.S.C. § 1341:

> § 1341. Frauds and Swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Statement of the Case

The charges against petitioner, Jack E. Bronston, an attorney for over thirty years and a State Senator representing the Borough of Queens, New York, for twenty years, were levelled against the background of New York City's well-publicized "bus shelter scandal." That "scandal," initially flagged by the media and thereafter the subject of inquiries by both a federal grand jury and New York City's Department of Investigation, evolved from the prospect of the award of a franchise to construct bus passenger waiting areas on the streets of New York (the "bus shelters"), such shelters producing substantial advertising revenues for the franchisee.

Petitioner was, at the time of his purported mail fraud, a senior partner of a very large New York law firm, Rosenman, Colin, Freund, Lewis & Cohen ("Rosenman"), which had been retained to represent a group of investors in an enterprise, BusTop Shelters, Inc. ("BusTop"), the interim bus shelter franchisee, then seeking a twenty-year renewal of its franchise without public bidding. When petitioner was unsuccessful in getting his firm, Rosenman, to represent another company competing for the franchise, Convenience & Safety ("C & S"), which Rosenman had already incorporated, and C & S's president, Saul Steinberg ("Steinberg")—a prior and continuing Rosenman client—petitioner arranged for other counsel to represent them in their competition for the franchise. The trial testimony revealed, however, that petitioner continued to have contacts with C & S and Steinberg at the time they were focusing upon the bidding for the franchise, and that peti-

tioner charged time on the Rosenman firm's records reflecting these contacts.

The C & S attorneys of record (the law firm petitioner had introduced to C & S) promptly wrote a letter, dated August 26, 1977, to the Mayor and to New York City's Board of Estimate (the City's publicly-elected body partially responsible for awarding the bus shelter contract) advising that it was representing C & S in the franchise bidding. There was evidence that this letter had been read to petitioner over the telephone, although the evidence at trial neither demonstrated whether this was before or after the letter was sent, nor did it suggest that petitioner made any contribution to this letter. On October 28, 1977, petitioner wrote a letter to the office of New York City's Comptroller. That letter, on petitioner's State Senate letterhead, informed the Comptroller's office of BusTop's failures to have performed fully under its interim franchise, and advised that it was not in the public interest to reward such non-performance. Each of these letters constituted the mail use upon which each of the two counts of the indictment was based, for which petitioner was convicted.

Although, as noted, petitioner had filled out his firm's time tickets for his conferences, telephone calls and correspondence with and for C & S and Steinberg, no bills were sent to Rosenman for petitioner's time, and Rosenman's internal methods were such that these time tickets did not contemporaneously come to the attention of Rosenman's management personnel or, through Rosenman, to BusTop.

Petitioner appealed the judgment of conviction, and, in a two-to-one decision, the Court of Appeals for the Second Circuit affirmed (1a). The majority held that petitioner had breached his fiduciary duty to the firm's client, the minority investors in the existing franchise, by secretly working in the interests of C & S. Recognizing that such a breach was insufficient standing alone to constitute mail fraud, the Court's majority held that petitioner failed to disclose this to the firm's client, thereby evidencing an intent to defraud.

Circuit Judge Van Graafeiland, in a strong dissent, pointed out that the mail fraud statute's application had been broadly extended to include fiduciaries' breaches but only when, unlike here, such criminal liability results because "the fiduciary relationship enabled the defendant to commit the wrongful acts" (24a); that the trial court had committed prejudicial error by not permitting the introduction of evidence either to show petitioner's good faith or that he breached no ethical duty, criminal intent being at the heart of mail fraud (26a-30a); and that the majority violated the general rule that ambiguous criminal statutes "should be resolved in favor of lenity" (24a), especially when a case involves practices within a "colossal" law firm where "[d]ifferences of opinion [concerning ethical duties] among knowledgeable persons are not uncommon" (25a).

Petitioner's sentence of imprisonment has been stayed pending the filing of this petition.

Reasons for Granting the Writ

The issues here presented by the petitioner—centering on the unique extension of the mail fraud statute to criminalize a wholly non-injurious purported breach of a fiduciary duty involving no misuse of confidential information —have, it is respectfully submitted, repercussions far beyond the *Bronston* prosecution.

This case highlights the absence of defined parameters for the mail fraud statute, a Congressional ban that prosecutors and the lower federal courts have been consistently extending, particularly insofar as the statute applies to purported fiduciary breaches. Mail fraud's substantive scope in the area of fiduciary breaches still remains wholly unconsidered by this Court.

Involved here also is a media-stimulated "scandal," and the resultant prosecutorial rationalizations of ingenious distensions of federal criminal statutes to embrace situations never earlier deemed either criminal or federal. This case also presents an opportunity to resolve the uncertainties within the Circuits as to the propriety of criminal convictions premised upon an accumulation of slender inferences. And deeply involved are due process considerations emanating from a conviction for a purported criminal mail fraud in which evidence of a lawyer-legislator's intent—whether, as the dissent noted, "the defendant, a State Senator representing the Borough of Queens, was acting in good faith in attempting to prevent a rip-off" of the people of New York City—was entirely excluded.

POINT I

Petitioner's conviction for the first time applies the mail fraud statute to a naked breach of a fiduciary duty that embraced no misuse of confidential information, involved no otherwise criminal conduct and resulted in no injury.

Prosecutors, in these post-Watergate years, have moved with special and often commendable alacrity when official involvement in "scandals" has been suggested. Such alacrity is appropriate, of course, where true *crime* is involved. But procrustean efforts to adapt statutes to situations for which they were never intended can, as here, unjustly felonize otherwise non-criminal conduct. Often, as here, mail fraud—extended in ways never envisaged at its creation[1]—provides the tool for such novel criminalization. The plasticity of the mail fraud statute was noted by Chief Justice Burger, dissenting, in *United States* v. *Maze*, 414 U.S. 395, 405-06 (1974), when he said:

> When a "new" fraud develops—as constantly happens—the mail fraud statute becomes a stopgap device to deal on a temporary basis with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil.

Mail fraud has, currently, been invoked to deal with myriad situations involving public officials. *See, e.g., United States* v. *Margiotta*, 646 F.2d 729 (2d Cir. 1981); *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445

1. Originally mail fraud was "aimed at flimflam artists who use the mails to defraud the gullible." *See* authorities cited in dissent (24a).

U.S. 961 (1980); *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). This use may be sound and logical when the official's misconduct in fact constitutes a fraud, and the mails have been used, but where, as here, the conduct does not embrace misrepresentation, reliance and injury—traditional elements of fraud—invocation of the statute is unsound.

Although the United States Supreme Court has, over the years, reviewed a number of convictions involving the mail fraud statute, these cases have by-and-large involved issues of mailing. *See, e.g., United States* v. *Maze*, 414 U.S. 395 (1974); *United States* v. *Sampson*, 371 U.S. 75 (1962); *Parr* v. *United States*, 363 U.S. 370 (1960); *Pereira* v. *United States*, 347 U.S. 1 (1954); *Kann* v. *United States*, 323 U.S. 88 (1944); *United States* v. *Kenofskey*, 243 U.S. 440 (1917). And while the substantive boundaries of mail fraud, boundaries specifying what properly constitutes *fraud*, have been limned by this high Court in several aging cases, *see, e.g., United States* v. *Comyns*, 248 U.S. 349 (1919); *United States* v. *New South Farm & Home Company*, 241 U.S. 64 (1916); *United States* v. *Stever*, 222 U.S. 167 (1911); *Durland* v. *United States*, 161 U.S. 306 (1896), this Court has never reviewed any of the growing number of cases in which a mail fraud conviction was premised upon a fiduciary breach. *See, e.g., United States* v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States* v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976); *United States* v. *Bush*, 522 F.2d 641 (7th Cir. 1975), *cert.*

denied, 424 U.S. 977 (1976); *United States* v. *Keane,* 522 F.2d 534 (7th Cir. 1975), *cert. denied,* 424 U.S. 976 (1976); *United States* v. *Isaacs,* 493 F.2d 1124 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974).

It is respectfully submitted that the *Bronston* decision —roundly criticized by Columbia Law School Professor John C. Coffee in *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches,* 19 AMER. CRIM. L. REV. 117 (1981)—so exceeds the previous limits ascribed to the mail fraud statute, that it presents an ideal vehicle for this Court, not simply to right an injustice, but to give guidance to the federal judiciary, the court below having "decided an important question of federal law which has not been, but should be, settled by this Court. . . ." U.S. Sup. Ct. Rule 17.1(c). In so doing, this Court will define the proper parameters of the too readily burgeoning mail fraud provision.

A. Bronston's purported fiduciary breach

Currently, mail fraud convictions often involve conduct that bears little resemblance to the flimflam schemes and larcenies that prompted the original legislation. Although today breaches of fiduciary duty afford a foundation for mail fraud prosecutions, when liability for mail fraud has been found, as the dissent has here noted, "it was inevitably because the fiduciary relationship *enabled* the defendant to commit the wrongful acts for which he was convicted" (24a) (emphasis added). For example, quite recently in *United States* v. *Von Barta,* 635 F.2d 999 (2d Cir. 1980), *cert. denied,* 450 U.S. 998 (1981), the court found that there was a breach of Von Barta's fiduciary duty to

his employer, Von Barta having utilized—stolen—his employer's credit, resulting in his employer's loss of two million dollars. *See also, United States* v. *Bohonus,* 628 F.2d 1167 (9th Cir.), *cert. denied,* 447 U.S. 928 (1980) (insurance manager was able to receive kickbacks as a result of his position of responsibility with his company); *United States* v. *Mandel,* 591 F.2d 1347 (4th Cir. 1979), *cert. denied,* 445 U.S. 961 (1980) (as a result of governor's fiduciary position, he was able to receive bribes and promote certain legislative positions).

In the instant case, however, there was absolutely no proof that Bronston's acts derived the slightest force from his position as a partner in a law firm that represented BusTop's minority investors; he committed no wrong *as a result of* his use of his fiduciary position. As the dissent stressed:

> The Government did not even prove that there was information of a confidential nature that might have been wrongfully disclosed. Every witness who was queried on the matter testified that there was no misuse of confidential information. The prosecution did not say one word in support of this contention in summation, and the district court did not discuss it in its charge. (26a)

This omission in the prosecution's case is particularly significant. When the trial Judge had denied petitioner's pre-trial motion to dismiss the indictment, ruling that it sufficiently alleged the elements of mail fraud, he stressed the importance of *the misuse* of confidential information, noting that:

> The Government has stated . . . that it will prove that . . . defendant knowingly used his fiduciary posi-

> tion in advising C & S and in promoting its interests in pursuance of the scheme alleged in the indictment. (39a)

Such evidence was never proffered.[2] In short, Bronston's fiduciary breach, if any, was at worst a technical breach. No proof was offered to suggest that he "converted," in any fashion, BusTop information to his own use or to the use of his client, C & S.

Indeed, the Second Circuit has here, for the first time, ruled that the federal felony of mail fraud pertains to conduct not otherwise criminal. Not only did Bronston not misuse any confidential information concerning BusTop for C & S, but he made no misrepresentations whatsoever. His continued contacts with C & S and Steinberg were duly noted by him. For each phone conference or meeting he attended, petitioner regularly filled out time tickets and sent them to the firm's accounting office, as acknowledged by the majority (16a). Certainly, this conduct demonstrated that petitioner did not misrepresent or conceal his continued contacts with C & S and Steinberg.

Neither letter, upon which each of the mail fraud counts was premised, contained as much as a single misrepresentation. One, written by C & S's new counsel (read to Bronston over the telephone either before or after it was mailed), simply announced C & S's then new legal representation. The other and more crucial letter, that of October 28, 1977, written by Bronston on his State Senate letterhead, criticized BusTop for not performing its obligations under its interim franchise. Evidence as to the accuracy

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2. *See* with respect to this aspect of this case, Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches*, 19 AM. CRIM. L. REV. 117, 135-36 (1981).

of petitioner's criticisms in this regard, his contention that the quick unopposed renewal of BusTop's franchise, without competitive bidding, would constitute a "rip-off" of the people of the City of New York, was deemed inadmissible by the trial court. As the dissent noted:

> The truth [or] falsity of [petitioner's statements in his letter] goes directly to the heart of the Government's claim of bad faith. Where lies the truth? The jury doesn't know, and neither do we. (30a)

Not only did petitioner not use his fiduciary position as a partner in a law firm improperly, misusing no secrets or confidences and making no misrepresentations, but there was no injury to Rosenman's client. Professor Coffee has suggested that the "real issue in *Bronston* was whether the defendant's relatively minor assistance to C & S was capable of causing 'significant economic harm' to BusTop."[3] Members of Rosenman, called by the prosecution, presented undisputed testimony that the BusTop investors received full and fair representation of their interest. And, as conceded by the majority, "[a]t no time relevant to the indictment in this case did the minority investors cancel the Rosenman Colin representation"[4] (7a).

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3. *Id.* at 136.

4. Once competitive bidding for the franchise commenced, BusTop attempted to claim that it was damaged by that open process. But in the various federal and state actions in which BusTop alleged such injury, its contention was rejected. *See, BusTop Shelters, Inc.* v. *Convenience & Safety Corporation, et al.*, 521 F. Supp. 989 (S.D.N.Y. 1981); *City of New York* v. *BusTop Shelters, Inc.*, N.Y.L.J., Sept. 4, 1980, p.11, col. 1 (Sup. Ct., N.Y. Co.); *City of New York* v. *BusTop Shelters, Inc.*, N.Y.L.J., Mar. 30, 1979, p.7, col. 3 (Sup. Ct., N.Y. Co.); *BusTop Shelters, Inc.* v. *City of New York*, 99 Misc.2d 198, 415 N.Y.S.2d 726 (Sup. Ct., N.Y. Co. 1978).

B. The lack of "something more," something beyond the fiduciary breach

Assuming that Bronston's counselling with C & S under the circumstances did constitute a fiduciary breach, the settled rule among the Circuits, including the Second Circuit, has heretofore been that a naked "breach of an employee's fiduciary duty, without more, does not violate the mail fraud statute." *United States* v. *Von Barta*, 635 F.2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981). *See also, United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) ("Neither breach of a fiduciary duty nor the receipt of secret profits . . . would suffice, standing alone, to show a § 1341 violation . . ."); *United States* v. *Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980) (a breach of a fiduciary duty "standing alone, could never be cognizable under the mail fraud statute . . ."); *United States* v. *Rabbitt*, 583 F.2d 1014, 1025 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) ("violations [of fiduciary duties] . . . do not in and of themselves establish the substantive crime of mail fraud . . .").

The majority in *Bronston* acknowledged that a naked breach of fiduciary duty without "something more" does not constitute the requisite scheme to defraud. Adopting the language of *United States* v. *Von Barta*, the Court said:

> The additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer. (15a)

So saying, the majority chose—despite petitioner's diligent filling out of his time tickets—to infer that there existed

this "additional element" of non-disclosure. Assuming Bronston's non-disclosure here (in that his time ticket information was never conveyed by Rosenman to the BusTop minority investors), it was not that "additional element," heretofore required in the various Circuits, to felonize a fiduciary breach. Any non-disclosure to the Rosenman clients was not something separate from, something that might be viewed as "something more" than, the fiduciary breach. Rather, the non-disclosure was at the very heart of the purported fiduciary breach. In effect, it was the inevitable alter ego of the breach, not materially severable from the breach itself. For example, Disciplinary Rule 5-105(c) of the ABA Model Code of Professional Responsibility expressly provides that an attorney *may* participate in multiple representations if each client consents "after full disclosure." And so if there has been full disclosure there has been no fiduciary breach. *See also, In re Taylor*, 567 F.2d 1183, 1191 (2d Cir. 1977) (no fiduciary breach occurred when there was full disclosure); *Kaplan* v. *Bombard*, 573 F.2d 708 (2d Cir. 1978).

The fact is that the majority's view here of non-disclosure, on the instant facts, as "something more" than the fiduciary breach turns out to be "nothing more" than the mere fiduciary breach itself. Thus, by affirming petitioner's conviction based upon a naked fiduciary breach, the majority in *Bronston* abrogated the settled rule among the Circuits, including the Second Circuit, that such a breach standing alone is simply not enough for a conviction under the mail fraud statute.

The impact of the majority's decision as it stands is to convert a lawyer's dubious fiduciary breach into a federal

felony. These are days of massive judicial concern with necessary federalization of contemporary conflicts (civil rights, environmental protection, housing reform, prison reform, etc.).[5] *See, e.g.*, Address by Chief Justice Burger to the American Bar Association in Atlanta, Georgia (Aug. 9, 1976); *see also*, Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349 (1972). Are disciplinary matters now to be added to the dockets of our federal courts and of the United States Attorneys? In *Armstrong* v. *McAlpin*, 625 F.2d 433, 446 (2d Cir. 1980), *vacated on other grounds and remanded*, 449 U.S. 1106 (1981), the Second Circuit, sitting in banc, had noted that "ethical conflicts . . . are generally better addressed by the 'comprehensive disciplinary machinery' of the state and federal bar. . . ." Yet if *Bronston* stands unreviewed, all United States Attorneys will be licensed to prosecute virtually all fiduciary breaches by attorneys that lead to disbarments, suspensions and admonitions. Following *Bronston*, *federal* prosecutions under the mail fraud statute (or the analogous wire fraud statute, 18 U.S.C. § 1343) might be instituted for commingling or conversion of funds, forgeries, falsely explained negligence, unlicensed practice of law, or other ethical breaches, assuming attorneys' use of the mails or the phones in connection with these breaches. Obviously, this is of pervasive concern to the New York Bar, much of which has been profoundly puzzled by the Second Circuit's transmutation in *Bronston* of a possible ethical breach into a federal felony.

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5. Judge Henry Friendly has noted De Tocqueville's comment that "scarcely any political question arises in the United States that is not resolved sooner or later into a judicial question. . . ." *See* H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 22 (1973).

C. The piling up of unproven inferences to support the conviction

We have previously noted (at pp. 11-12, *supra*) the dissent's critique of the majority, that its "statement that there was sufficient evidence to support an inference of 'use of or manipulation of Bronston's breach of fiduciary relationship' is completely without support in the record" (25a). This, however, is only one of a series of wholly unsupported inferences foundational to the instant conviction and to its affirmance upon appeal.

For example, the majority opinion below, some five times, treated as fact that Bronston was paid $12,500 *as a fee* by Steinberg for legal services rendered C & S (11a, 12a, 15a, 19a, 21a). In support of the conclusion that a check Bronston had received in this amount represented a legal fee, the trial court only had in evidence the check itself, and the fact that Bronston had, many months earlier, estimated routinely, for firm financial planning only, that the C & S legal fee *might* be in that amount. In fact, not only would it be almost unprecedented for a businessman to use his personal check to pay his company's legal fee, but there was no *direct* evidence that this check represented a fee for Bronston. Indeed, a report by New York City's Department of Investigation concluded, after full inquiry, that the check to Bronston was a means utilized by Steinberg for non-criminal "laundering" of a campaign contribution of Steinberg's to a campaign chest for New York City's Comptroller. The Department of Investiga-

tion report does not even posit the possibility that the check was given to Bronston as a legal fee.[6]

Another key conclusion, supported only by inferences, was that Bronston's contacts with C & S were utilized to aid that enterprise in its bus shelter bidding. Yet there was not an iota of direct testimony that Bronston's telephone calls, meetings and conferences with C & S personnel, including Steinberg, related to C & S's efforts to obtain the bus shelter franchise. If they did not, there would have been no conflict of interest whatsoever, and no potential breach of any fiduciary duty by Bronston. Indeed, counsel of record for C & S testified that Bronston performed no role in connection with C & S's shelter bid. It was only an inference, not actually in conflict with the evidence, that urged that Bronston secretly counselled C & S in connection with that company's efforts to obtain the bus shelter franchise. Steinberg having previously been a Rosenman firm client, normal client spoon-feeding would have involved keeping in touch with that client—even though not representing it in the bus shelter bidding—in the hopes that other non-conflicting business might later be produced.

While the Second Circuit has a lenient rule permitting convictions resting in part upon mere inferences, there is a split among the Circuits in this regard. *Compare, United States* v. *Grunberger,* 431 F.2d 1062 (2d Cir. 1970) (in-

6. *See* REPORT OF THE DEPARTMENT OF INVESTIGATION, CITY OF NEW YORK: "ANATOMY OF A MUNICIPAL FRANCHISE" at 1-5 of the Introduction, 32-33, 38-39 of the Factual Summary and Chronology, and 11-15 of the Conclusions (July 1981). This REPORT was lodged with the Clerk of the Supreme Court at the time this petition was filed.

ferences reasonably drawn from circumstantial evidence need not preclude every reasonable hypothesis other than guilt) with *United States* v. *Alfrey*, 620 F.2d 551 (5th Cir.), *cert. denied*, 449 U.S. 938 (1980) (test for sufficiency of evidence to convict is whether reasonable minds could conclude that the evidence is inconsistent with any reasonable hypothesis of the accused's innocence).

In light of this conflict, and the fact that the inferences that were made here without direct supporting evidence were *foundational* to Bronston's conviction, not merely of some bearing upon it, it is respectfully submitted that this conviction affronts fundamental Fifth Amendment due process concepts. Essentially, Bronston was convicted on inferences, not upon admissible evidence, subject to sound evidentiary testing and effective cross-examination.

POINT II

With intent an essential element of the crime charged, excluding evidence of petitioner's good faith deprived him of due process.

Responding to the Government's claim of petitioner's intent to defraud, the trial court emasculated the defense of good faith:

> The trial court told counsel and jurors on numerous occasions that whether or not there was a breach of ethics was not an issue in the case. I disagree . . . . Evidence concerning the defendant's motives and his belief in the propriety of his conduct was material,

> because it might have tended to repel the inference of fraudulent intent. . . .
>
> > [S]ince [intent] may be only inferentially proven, 2 Wigmore on Evidence §§ 300, 302, 3d Ed. 1940, no events or actions which bear even remotely on its probability should be withdrawn from the jury . . . .
>
> *United States* v. *Brandt*, 196 F.2d 653, 657 (2d Cir. 1952). (26a-27a)

This sound rule, long adhered to in the Second and other Circuits, regarding evidence to prove intent, was violated when the trial court refused to permit testimony on the truth of petitioner's assertions criticizing the current franchisee that were levelled in his letter as State Senator, this letter being the "linchpin" of the Government's case (29a). Moreover, the same rule concerning proof bearing on intent was also violated when the trial court barred expert testimony as to whether or not there was even a breach of legal ethics by the petitioner. The Court of Appeals here affirmed the mail fraud conviction, Bronston not having been permitted to show either that as a lawyer he had violated no ethical canon, or that as a legislator his letter to the City Comptroller's office was in all respects accurate, and served and was motivated by a valid exercise of his legislative role.

The ramifications of this ban on testimony of intent, of good faith, go far beyond the instant case. With intent one of the critical elements of mail fraud, barring a defendant from offering relevant proof to rebut that element of criminal intent is, it is submitted, a Fifth Amendment due process denial: a defendant has been convicted at a trial in

which he was denied the opportunity to introduce evidence that might have shed reasonable doubts as to a critical element of the crime with which he was charged. This denial took place both in the majority's sustaining "[t]he exclusion of [Max] Freund's testimony regarding the ethical propriety of Bronston's conduct in promoting the interests of C & S" (22a), and in its affirmance of the exclusion of evidence of Bronston's concern with the bus shelter situation on behalf of his constituents (21a).

If an attorney's conduct is not even in violation of the Code of Professional Responsibility—as, apparently, Max Freund was prepared to testify concerning Bronston's conduct—it is suggested that such conduct cannot constitute such a fiduciary breach as to be a felony in violation of the federal mail fraud statute; no venality and no improper intent are involved. Among the issues that might have been entertained on trial, but were not, that would have shed light on the purported ethical breach, are:

— Is a retainer to do a lawyer's technical job in a non-litigated matter simply that, or—as the trial court and the majority assumed—does it require that the law firm and all of its members refrain from any opposition to those larger client goals that the technical legal job is to foster? *E.g.*, did Rosenman's retainer to represent minority investors in BusTop commit the partnership, and all of its members, to furthering BusTop's efforts at holding on to New York City's bus shelter franchise (or, at least, not to oppose such efforts), even if it is assumed that letting such franchise without competitive bidding might counter-serve the public interest?

— Assuming that a massive law firm deems that active representation, in any regard, of competing bidders is a conflict, and bars its partners from formally representing a client who is now competing, in a particular transaction, with the client for whom representation has been accepted, do standards of professional conduct wholly prohibit a partner of that firm from continuing to meet with the interdicted client—which client has actually retained other counsel to represent it actively—when such continued contacts serve to facilitate the relationship between the new counsel and its client, as well as to keep the firm on such good terms with that client, that other legal business may, in the future, be forthcoming for the firm?

What is the obligation of the lawyer-legislator, wearing his legislative hat, particularly the lawyer-legislator who is part of one of today's large firms? The dissent noted that "Courts and commentators dealing with individual conflict of interest claims in today's colossal law firms have struggled to avoid unfair, mechanically applied rules formulated at a time when such law firms as existed were small in size" (25a).

If the prevailing opinion is to stand, can a prospective client buy a lawyer-legislator's silence—purchase his non-opposition to pending legislation—by becoming a client of the lawyer-legislator's firm? Can a lawyer-legislator favor tenant-oriented laws if his firm represents residential landlords? Should lawyer-legislators find that their public interest motivation, their good faith actions as legislators, are ignored, and—as here—ruled to be without legal relevance when they take legislative positions that may be

potentially contrary to the interests of their firms' clients, then bright, dedicated lawyer-legislators will be effectively inhibited from making large firm affiliations, or may at the cost of maintaining such affiliations be obliged to resign their legislative offices. In *United States* v. *Gillock*, 445 U.S. 360 (1980), this Court ruled that state legislators lacked any evidentiary privilege concerning their legislative actions when federally prosecuted for purported criminal conduct. Sound public policy is disserved by placing state legislators in a "Heads-I-win-tails-you-lose" bind in this regard. Yet that is precisely what *Bronston* does, viewed along with *Gillock*. Taken together, although the Government can, in proving criminality, prove a legislative act *against* a legislator (see *Gillock*), a legislator is barred from urging his legislative purposes—as demonstrating his intent—to rebut Government claims of criminality (see *Bronston*). It is respectfully submitted that this result has no justification, and should be corrected by this Court.

It is no response to note that these matters need not have been addressed as Bronston served not only as a State Senator but also as a private attorney for C & S. Because of the importance, stressed by the prosecution, of the Bronston letter of October 28, 1977, criticizing BusTop's noncompliance with its franchise, the question should have been posed for the jurors to determine which hat Bronston wore: whether his letter was the product of his representation of C & S (wholly unmentioned in the letter) or, as appeared from its format and the Senate letterhead, whether Bronston was exercising his role as State Senator.

The jury, however, was not permitted access to that evidence that might have satisfied them concerning the latter. This is not simply an evidentiary question. Essentially, the defense was barred from eliciting any evidence that would have demonstrated the absence of criminal intent. The dissent posed the rhetorical question:

> Should not the jury have been given all the facts [regarding the letter] so that it could have made a fair, even-handed determination whether the defendant, a State Senator representing the Borough of Queens, was acting in good faith in attempting to prevent a rip-off? The jury was not given all the facts. The district court prevented it. (29a-30a).

In this regard, State Senator Bronston, a lawyer, was not unique. In 1979, a full 20% of state legislators in the United States—1,493 office holders—were lawyers by occupation.[7] Under such circumstances, it is respectfully urged that it is appropriate that the Supreme Court consider the role of a lawyer in part-time public employment, including questions of his intent, should he be prosecuted as was Bronston for a purported fiduciary breach under the mail fraud statute.

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7. Occupational Profile of State Legislatures 1979 9. In New York, where petitioner both practiced as an attorney and served as a legislator, the proportion of state legislators who were also lawyers was *over one-third*. *Id.* at 44.

Conclusion

For the reasons set forth above, petitioner respectfully requests this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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February, 1982

Appendix

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

No. 1291—September Term, 1980

(Argued April 27, 1981 Decided August 19, 1981)

Docket No. 81-1015

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

JACK E. BRONSTON,
Defendant-Appellant.

Before:

LUMBARD, MANSFIELD, and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Pollack, J.) rendered after a jury trial convicting appellant of two counts of mail fraud, 18 U.S.C. § 1341.

Affirmed.

LOUIS NIZER, Esq., New York, NY (Phillips, Nizer, Benjamin, Krim & Ballon, New York, NY, of counsel), *for Appellant.*

PAMELA ROGERS CHEPIGA, Assistant U.S. Attorney, New York, NY (William M. Tendy, Chief Assistant U.S. Attorney, Patricia M. Hynes, Mary Jo White, Assistant U.S. Attorneys, New York, NY, of counsel), *for Appellee.*

Appendix A

MANSFIELD, *Circuit Judge:*

Jack E. Bronston appeals from a judgment of the Southern District of New York entered after a jury trial before Judge Milton Pollack, convicting him of two counts of mail fraud, 18 U.S.C. § 1341,[1] based on the government's allegations that he fraudulently violated his fiduciary duty as an attorney by helping to further the efforts of Convenience and Safety Corporation ("C & S") and Saul Steinberg, chairman of C & S, to obtain a bus stop shelter franchise from the City of New York at the same time when the law firm in which he was a partner, Rosenman, Colin, Freund, Lewis & Cohen ("Rosenman Colin"), was representing a group of investors in BusTop Shelters, Inc. ("BusTop"), the then current holder of the franchise and a participant in the competition for its renewal. We affirm. The evidence was sufficient to allow the jury to convict Bronston of mail fraud based on his breach of his duty of loyalty to his firm's clients, his concealment from the

1. Title 18 U.S.C. § 1341 provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

clients of his promotion to their harm of the interests of Steinberg and C & S in obtaining the franchise, his specific intent thereby to defraud his firm's client of the very economic value his firm had been retained to protect, and his mailing of two letters in furtherance of the fraudulent scheme.

On May 8, 1975, BusTop obtained an interim franchise from the City of New York to build and maintain shelters at bus stops over a three-year period. In the spring of 1977, as the end of the interim franchise was drawing near, BusTop began seeking outside capital with which it could expand its business and improve its chances of persuading the City that a 20-year renewal of its franchise was in order. After extensive negotiations, two venture capital companies, Citicorp Venture Capital Limited (a subsidiary of Citicorp) and Fifty-Third Street Ventures, Inc. (collectively "the investors" or "the minority investors"), tentatively agreed to make a substantial investment in BusTop. On June 1, 1977, the investors contacted Samuel ("Sandy") Lindenbaum, a partner in the Rosenman Colin firm, and retained the firm to advise them in making the investment.

At approximately the same time Jack Bronston, who was then a partner in the Rosenman Colin firm and a state senator from Queens, learned that his friend and client, Saul Steinberg, was also interested in retaining Rosenman Colin to assist him in his efforts to obtain the bus stop shelter franchise. Acting on Steinberg's behalf, Bronston met with Lindenbaum on May 17, 1977, to tell him that Steinberg wanted to retain Rosenman Colin to represent

him in his bus stop shelter endeavors, and that he wanted Lindenbaum to appear on his behalf before the Board of Estimate. Lindenbaum immediately declined to undertake the representation, however, because, although BusTop was not itself a client of Rosenman Colin (and the representation of the minority investors had not yet begun), Lindenbaum did not feel he could work against BusTop, in view of his personal friendships with BusTop's public relations consultant and attorney. Despite this reaction from Lindenbaum, Bronston went ahead on Steinberg's behalf and had a Rosenman Colin associate set up a Delaware corporate shell under the name of "Convenience and Safety Corporation," which would serve as Steinberg's vehicle in the bus stop shelter competition. C & S was incorporated on June 2, 1977.

On June 9, 1977, Bronston, by this time aware that Rosenman Colin had been retained as counsel by the BusTop investors, wrote a memorandum to his firm's new business committee, suggesting that the firm take on the representation of C & S

> "which will serve as an investment vehicle for the erection of public bus shelters in New York City, Philadelphia, Chicago and Seattle. This may involve conflict with other clients of the office and should be discussed."

Murray Cohen, a member of the committee, was the first to receive Bronston's memo, and immediately returned it to him with the notation: "We should not do anything further on this until Sandy [Lindenbaum], you and I talk about it. There is a definite conflict." At trial, Cohen tes-

tified that at a subsequent meeting with Bronston and Lindenbaum he told Bronston that the firm could not represent C & S because its interests were "inimical" to those of the investors in BusTop. The situation was described by Cohen:

> "The investors were proposing to invest over a period of time $1,300,000 in BusTop and obviously were counting on BusTop obtaining a renewal of its franchise, and Convenience and Safety was going to be a competitor of BusTop for that franchise and, therefore, if we were successful on behalf of Convenience and Safety, we would have jeopardized the financial investment of the investors in BusTop."

Despite this clear response from Cohen rejecting his proposal that the firm accept the C & S representation, Bronston went back to Cohen on July 5, and proposed that he authorize the establishment of a client billing number for C & S "just in case at some time in the future something developed in which there was not a conflict." Cohen acceded to Bronston's request, but expressly instructed him that no work was to be performed on behalf of C & S without his prior approval. The memorandum written by Bronston to the firm's bookkeeper makes it clear that Bronston understood the very limited nature of Cohen's acquiescence:

> "This new matter memorandum has been approved by Murray Cohen subject to the understanding that no further work will be performed on this matter without his explicit consent."

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In August, 1977, representation of C & S's effort to acquire the New York City franchise was transferred to the law firm of Stein Rosen & Ohrenstein.[2]

Thus, no later than June 9, 1977, the Rosenman Colin firm had made the decision to represent the BusTop investors rather than C & S in the competition for New York City's bus stop shelter franchise, and this decision had been authoritatively communicated to Jack Bronston. For the next two months Rosenman Colin attorneys labored on behalf of the minority investors in negotiating the exact terms of their participation in BusTop. The initial agreement memorializing this participation was signed in the Rosenman Colin offices on August 16, 1977. The agreement provided that the minority investors would make their investment in several stages. The first stage called for the investors to purchase $300,000 worth of secured BusTop notes, which would be converted into stock when and if certain conditions were met, the most important of which

2. On December 7, 1977, Cohen received a memorandum from Bronston urging the firm to accept the C & S account on a nationwide basis, on Bronston's representation that no conflict with BusTop would exist outside of New York City. Cohen's response was to assign an associate to research the question of whether, if BusTop were not seeking shelter franchises outside New York, it would be proper for Rosenman Colin to accept the C & S account on a non-New York basis. Before this question could be resolved, however, Cohen learned in mid-January 1978 from Howard Schneider, another Rosenman Colin partner, that BusTop was in fact seeking franchises outside New York. Cohen thereupon instructed Bronston that no representation of C & S would be permitted anywhere in the country. (Cohen did, however, allow Bronston to complete a small project for C & S in New Jersey, which Bronston had undertaken pending a decision from Cohen on his request for approval to undertake the C & S nationwide representation and which was too far advanced to be transferred to another firm.) On January 25, 1978, Bronston wrote Steinberg to inform him of Rosenman Colin's decision to decline the C & S representation.

was BusTop's obtaining a renewal of the franchise. In later stages, additional investments totaling $1,050,055 would be made. At the time this initial agreement was signed, the parties expected that the Rosenman Colin firm would continue to represent the investors after the signing. Howard Schneider, the Rosenman Colin partner most deeply involved in the investors representation, described the arrangement at trial:

> "the clear contemplation of the agreements and of the parties was that there would be a continuation of representation of the investors for the consummation of the transactions that were contemplated by the first financing agreement."

At no time relevant to the indictment in this case did the minority investors cancel the Rosenman Colin representation.

At the same time when these efforts were being made by Rosenman Colin lawyers on behalf of the BusTop investors, Bronston was secretly continuing his relationship with C & S. At the first meeting of C & S's board of directors, on June 17, 1977, Bronston was elected to a one-year term as the corporation's assistant secretary. On 15 separate occasions between August 25, 1977, and February 6, 1978, Bronston met with Steinberg and later filled out time tickets at his law firm indicating that the time spent was billable to C & S.[3] Bronston's time tickets reflected an additional half dozen meetings with other C & S officials

3. At no time was any bill based on these time tickets sent to C & S. This may have been due to the fact that under firm billing procedures Bronston could not bill C & S directly, since all bills were screened by the firm's billing committee prior to transmittal.

during this same period, with the time recorded as billable to C & S.

Despite the fact that the legal representation of C & S's efforts to obtain the New York City franchise was formally transferred to Stein Rosen & Ohrenstein in August, 1977, Bronston continued thereafter to attend meetings at which C & S business in New York was discussed, and was kept informed about the progress of the C & S bid. Important internal documents dealing with the New York bid prepared by C & S or by lawyers for Stein Rosen were routinely sent to Bronston, occasionally by messenger. Finally, the billing records of David Simpson, the Stein Rosen partner principally responsible for the C & S account, indicated that on at least six occasions between December, 1977, and June, 1978, Bronston participated in conference calls or meetings which Simpson billed to C & S.

There was also evidence that, during the period when Bronston was secretly working in the interests of C & S against those of BusTop and his firm's clients, Lindenbaum was meeting with the clients (Venture Capital and Fifty-Third Street Ventures), was actively engaged in negotiating their agreement to invest in BusTop, was unaware of Bronston's activities on behalf of C & S, and was conferring with Bronston with respect to the clients' investment in BusTop. These conferences were billed by Lindenbaum to the clients. At the same time Bronston made out tickets to bill C & S for time spent in discussing with Steinberg Bronston's conversations with Lindenbaum. Billing records reveal that some of these Lindenbaum-Bronston meetings which were followed by Bronston-Steinberg conferences occurred at points of critical importance to the

clients and to C & S in pursuing their competing and conflicting interests. For instance, on October 21, 1977, the day after the New York City Board of Estimate was to consider BusTop's application for the bus stop franchise, Lindenbaum and Bronston had a one-hour breakfast discussion which Lindenbaum billed to the BusTop investors as clients. Three hours later Bronston had a 2½-hour meeting with Steinberg and others which he noted for billing to C & S. His firm's clients, the BusTop investors, were not informed of his activities on behalf of C & S in conflict with their interests.

The indictment against Bronston charged him with two counts of mail fraud, growing out of the sending of two letters allegedly intended to increase C & S's chances of wresting the New York bus stop shelter franchise from BusTop. The first count involved a letter sent by Stein Rosen on C & S's behalf to the members of the New York City Board of Estimate. The letter was prepared after Bronston had met with Steinberg and Samuel Stein of Stein Rosen on August 25, 1977. It was decided at that meeting that a letter should be sent to the Board publicly announcing C & S's interest in presenting to the City a plan for building and operating bus stop shelters, and introducing Stein Rosen as counsel for C & S. The letter was drafted by Stein Rosen lawyers, but before it was sent a copy of the draft was hand-delivered to Steinberg for review. Steinberg went over the letter with Bronston, and Bronston then telephoned Stein at Stein Rosen to let him know that he thought it was a good letter. Bronston then noted to bill C & S for five hours of services on August 25, specifically including his "review of letter with Saul Steinberg." He also noted an

additional half hour spent on C & S business on August 26 for his telephone conference with "Sam Stein re letter." When the City subsequently responded to the August 26 letter, Bronston participated in a meeting with Steinberg and Stein to evaluate the response, and filled out a time ticket in the name of C & S for the time spent.

The second count grew out of a letter which Bronston himself drafted and sent on his official New York State Senate stationery to Richard Wells, Executive Assistant to New York City Comptroller Goldin, on October 28, 1977. In relevant part, the letter read as follows:

> "I enclose some figures in connection with the existing franchise which I am sure you have, but which I would like to reiterate. Obviously, a renewal of the existing franchise would not appear to be in the public interest since it might be taken for a reward for non-performance."

The enclosure consisted of a one-page summary of the status of BusTop's performance under the interim franchise, emphasizing BusTop's failure to comply with the terms of the agreement. The final paragraph read as follows:

> "Based upon the anticipated program of building approximately 4,000 shelters (including purchase from the City of the approximately 400 shelters built to date by BusTop Shelters, Inc.) and assuming payment to the City of between 14-16% of gross advertising revenues, the City would receive in excess of $2 million per annum at the conclusion of such construction program."

This letter was a retyped version of an October 27, 1977, memorandum from Henry Silverman, President of C & S, to

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Sidney Baron, C & S's public relations consultant, which had been changed in minor respects by Bronston to eliminate any reference to C & S, as the following pertinent portion of the C & S memorandum (with changed portions underlined) shows:

> "Based upon *our* anticipated program of building approximately 4,000 shelters (including *our* purchase from the City of the approximately 400 shelters built to date by BusTop Shelters, Inc.) and assuming payment to the City of between 14-16% of gross advertising revenues, *we believe that* the City would receive *from our operations* in excess of $2 million per annum at the conclusion of *our* construction program."

The letter was typed on Bronston's official Senate stationery by his Rosenman Colin secretary and was mailed by her with the enclosure. Bronston then noted to bill C & S for a "letter to Richard Wells."

For its services to the BusTop investors Rosenman Colin billed approximately $52,000, which the investors paid without being aware that Bronston had been working for Steinberg and C & S and against their interests. In addition, there was evidence at trial from which the jury could have inferred that Bronston was paid $12,500 by Steinberg for his efforts on behalf of C & S. On December 9, 1977, Bronston wrote to Steinberg, detailing his time charges to date and indicating that he would not ask for payment "until you and your partners decide on a format through which this can be done." On June 28, 1978, Bronston received a personal check from Steinberg (which was never recorded on C & S's books) for $12,500, the precise amount which Bronston had previously estimated to Rosenman Colin as

the retainer that would be forthcoming in 1978 if the C & S representation were accepted.[4]

Prior to trial Bronston moved to dismiss the indictment on the ground that it failed to allege that Bronston utilized or took advantage of his fiduciary position in order to effectuate the fraud charged. In response, the government argued in the alternative that: (a) proof of misuse of the defendant's fiduciary position to effectuate the fraud is not a necessary element of a mail fraud prosecution; and (b) even if it is, the government will prove at trial "that Bronston *did* use his fiduciary position to advise C & S and to promote the interests of C & S, in opposition to those of BusTop and the minority investors" (emphasis in original). The district court denied Bronston's motion. Without deciding the issue of law posed by Bronston, the court held that the indictment adequately set forth the elements of the offense intended to be charged. 491 F.Supp. 593, 594 (S.D. N.Y. 1980). At the conclusion of trial, counsel for Bronston proposed the following charge,

> "in order to find a scheme to defraud, the prosecution must establish beyond a reasonable doubt that Mr. Bronston *used* the fiduciary position he held on behalf of the minority investors to further the interests of Convenience and Safety" (emphasis in original),

which Judge Pollack declined to give.

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4. Sometime between July 18 and 20, 1978, Bronston's letter to Richard Wells was uncovered by BusTop pursuant to a request under New York's Freedom of Information Law which was served on the Comptroller's office. At trial, defense counsel introduced in evidence a check from Bronston to Steinberg for $12,500 dated July 19, 1978, and marked "repayment of exchange."

Appendix A

DISCUSSION

Bronston's principal contention is that in order to show a violation of the mail fraud statute based on a fraudulent breach of fiduciary duty, the government must prove that the defendant used his breach in some way that would benefit himself or harm the victim of the fraud and that the trial judge erred in failing to instruct the jury accordingly. Under this test, Bronston argues, the conviction must be reversed since the evidence was insufficient to permit the jury to find that he used his fiduciary status as a partner of Rosenman Colin to benefit himself or C & S at the expense of the BusTop investors. We disagree.

Although a mere breach of fiduciary duty, standing alone, may not necessarily constitute a mail fraud, *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979), *cert. denied,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980); *United States v. Rabbitt,* 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979); *United States v. Bush,* 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied,* 424 U.S. 977, 96 S.Ct. 1484, 47 L.Ed.2d 748 (1976), the concealment by a fiduciary of material information which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other is a violation of the statute. *United States v. Von Barta,* 635 F.2d 999 (2d Cir. 1980); *United States v. Bohonus,* 628 F.2d 1167 (9th Cir.), *cert. denied,* 447 U.S. 928, 100 S.Ct. 3026, 65 L.Ed.2d 1122 (1980); *United States v. Mandel, supra; United States v. Keane,* 522 F.2d 534 (7th Cir. 1975), *cert. denied,* 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976); *United States v. Isaacs,* 493 F.2d

1124 (7th Cir.), *cert. denied,* 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974). See generally Note, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute,* 47 U.Chi.L.Rev. 562 (1980). As we noted in *Von Barta, supra,* proof that the fiduciary relationship was used or manipulated in some way is not necessary.

> "Thus to make out a mail fraud violation, the Government must show that the scheme was devised with the specific intent to defraud, e. g., *United States v. Keane,* 552 F.2d 534, 544 (7th Cir. 1975), *cert. denied,* 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976). . . .
>
> "To prove mail fraud, the prosecution must also demonstrate that the use of the mails in furtherance of the scheme was reasonably foreseeable, e. g., *Pereira v. United States,* 347 U.S. 1, 8-9, 74 S.Ct. 358, 362, 98 L.Ed. 453 (1954). Furthermore, the deceit must have gone to the nature of the bargain, *United States v. Regent Office Supply Co.,* 421 F.2d 1174, 1182 (2d Cir. 1970); that is, any nondisclosures or affirmative misrepresentations must have been material, see, e. g., *United States v. Bush,* 522 F.2d 641, 647-48 (7th Cir. 1975), *cert. denied,* 424 U.S. 977, 96 S.Ct. 1484, 47 L.Ed. 2d 748 (1976); *United States v. Bryza,* 522 F.2d 414, 425-26 (7th Cir. 1975), *cert. denied,* 426 U.S. 912, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976). And although the Government need not show that the scheme's victims were in fact defrauded, *United States v. Andreadis,* 366 F.2d 423, 431 (2d Cir. 1966), *cert. denied,* 385 U.S. 1001, 87 S.Ct. 703, 17 L.Ed.2d 541 (1967), the prosecution must prove that some actual harm or injury was at least contemplated, *United States v. Dixon,* 536 F.2d

1388, 1399 n.11 (2d Cir. 1976); *United States v. Regent Office Supply Co., supra,* 421 F.2d at 1180.

* * *

"The additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer." *United States v. Von Barta, supra,* 635 F.2d at 1005 n.24, 1006."

In the present case the indictment charged that Bronston, in disregard of the fiduciary duty he owed as a member of the Rosenman Colin firm to the BusTop investors and for the purpose of benefiting Steinberg and C & S to their detriment, promoted the interests of Steinberg and C & S in their efforts to obtain a bus shelter franchise from the City of New York and "did conceal from, and fail to disclose to, the BusTop minority investors and BusTop the fact that he was advising and promoting the interests of Steinberg and C & S." These allegations, coupled with the charge that Rosenman Colin received $50,000 from BusTop for services to it, that Bronston received a check for $12,500 from Steinberg for promoting the interests of Steinberg and C & S with the intent of harming BusTop, and that Bronston caused two letters to be mailed in furtherance of the scheme, were sufficient to state a violation of the mail fraud statute.

Applying these standards, the evidence before the jury was sufficient to support a conviction for the alleged mail fraud. It is clear beyond doubt that as a member of the Rosenman Colin firm Bronston owed a fiduciary duty to its clients, the BusTop investors, and that in promoting the

interests of Steinberg and C & S in competition and conflict with those of his firm's clients, Bronston violated that duty. DR5-105, Code of Professional Responsibility. See generally T. Morgan and R. Rotunda, *Professional Responsibility*, 53-58 (2d ed. 1981). Having retained the Rosenman Colin firm as their counsel, the BusTop investors were entitled to the undivided loyalty of its partners.

The element of specific intent to defraud was likewise established. There was ample evidence that Bronston, with knowledge that his law firm was representing investors who had entered into a long-term financial commitment to BusTop, which was dependent upon BusTop's success in securing renewal of its franchise, was secretly engaged, without disclosure to his firm's clients, in an ongoing and significant role in C & S's efforts to obtain the franchise for itself, which would cause serious harm to the clients. Despite his firm's explicit prohibition against any further involvement on behalf of C & S, he attended frequent meetings at which the C & S bid for the New York franchise was discussed. By filling out time tickets showing C & S as the client whenever he attended such a meeting or engaged in other activities in connection with C & S, Bronston gave the jury ample ground for finding that he perceived himself as acting on behalf of C & S, even though he was professionally obligated to remain loyal to the interests of the BusTop investors.[5]

5. Bronston argues that, had he intended to conceal his C & S activities from his partners and the BusTop investors, he would never have filled out time tickets listing C & S as the client and then sent them to the firm's accounting office for registry on the firm's books. However, there is no evidence of any in-house mechanism which would have brought the time charges to the attention of anyone at Rosenman

(footnote continued on next page)

See generally *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976). Finally, by writing an anti-BusTop letter to Richard Wells and by participating in the preparation of another letter to city officials in support of C & S's bid, Bronston was engaging in furthering the scheme to defraud BusTop and its investors.

The element of concealment of a material fact, necessary to prove the alleged scheme to defraud, was also established. At no time did Bronston reveal to the BusTop investors that he was working hand in glove with Steinberg and C & S to obtain the franchise for C & S to their detriment. The materiality of this fact is self-evident. This was no mere technical failure on a law firm's part to disclose all potential conflicts of interest to its clients. One can imagine few nondisclosures more crucial to an attorney-client relationship than the fact that the law firm which the client has retained is actively engaged in efforts designed to frustrate the precise endeavor which the client had engaged the firm to pursue.

The record is equally clear that the scheme to defraud BusTop and its investors of the bus stop shelter franchise was designed to inflict actual economic harm on the BusTop

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Colin who would have recognized their impropriety; in fact, they were only turned up after Bronston's activities on behalf of C & S had been uncovered through other means.

In any case we find Bronston's time ticket entries principally probative not of his intent to deceive his partners and the BusTop investors but rather of his state of mind as he met with Steinberg and associates during 1977 and 1978. By noting that his time would at some future time be billed to the C & S account, Bronston was declaring in a most graphic fashion that he conceived of his efforts on behalf of Steinberg and the others as being professional rather than social and as redounding to C & S's benefit. The fact that under the circumstances it may have been foolish for Bronston to have made the entries does not render them exculpatory.

investors and was capable of doing so. Bronston disputes this statement, arguing that the BusTop investors were merely lenders who were protected by "perfect" security which would leave them unharmed even if C & S were to win the franchise. He also contends that the conditions specified in the August 16, 1977, agreement between the investors and BusTop made renewal of the BusTop franchise such a remote possibility that Bronston's efforts on behalf of C & S were irrelevant. We are unpersuaded.

There was sufficient evidence before the jury to support a finding that the minority investors' position after August 16, whether characterized as one of lender or equity investor, was sufficiently risky to give them an economic interest in the future of BusTop. While the initial moneys advanced to BusTop were technically in the nature of a loan which was collateralized by all of BusTop's tangible assets (principally the completed bus shelters), there was testimony at trial from Peter Gerry of Citicorp Venture Capital Limited that the validity of the lien thereby granted to the investors was in doubt because the terms of the interim franchise itself prohibited BusTop from granting liens on the shelters. Moreover, it was Gerry's testimony that the investors conceived of their participation in BusTop as more in the nature of an equity investment than a loan. They therefore considered the renewal of the franchise of central importance to the economic success of their participation in BusTop. The argument that the conditions imposed in the August 16 agreement were so unlikely to be met that there was no real chance that the investors would ever have been called upon to complete their investment and turn their notes into shares of BusTop stock is highly

speculative and inherently unprovable. Surely it could not properly have served as a basis for taking the issue of economic harm away from the jury. In any event, as alleged in the indictment, Bronston, by means of his fraudulent conduct, benefited to the extent of receiving a check for $12,500 from Steinberg which was returned only after his fraudulent activities were discovered by his firm's clients, and, in addition to the prospective harm the clients faced from BusTop's potential loss of the franchise, they suffered actual loss to the extent of paying the Rosenman Colin firm as their counsel $52,000 for undivided loyalty which they did not receive. Moreover, although use or manipulation of Bronston's breach of fiduciary relationship was not a prerequisite to conviction, the proof that Bronston, immediately following a conference with Lindenbaum regarding their clients' investment in BusTop, discussed the conversation with Steinberg provided the basis for an inference that such activity occurred. The government was frustrated in eliciting any detail with respect to these conferences by Lindenbaum's rather strange inability to recall even the substance of what was discussed, and the refusal of Steinberg and Silverman (President of C & S), who apparently indicated they would invoke their Fifth Amendment privilege, to testify. Bronston, the central figure in both conversations, exercised his constitutional right not to take the stand in his own defense.

Finally, the evidence at trial was sufficient to support the jurisdictional predicate contained in the mail fraud statute that the defendant be found to have "place[d] in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by

the Postal Service," in furtherance of his fraudulent scheme.[6] The letter which Bronston drafted and had sent to Richard Wells falls within the statutory language, as Bronston seems to concede. While it is true that Bronston's participation in the preparation and mailing of the letter to the members of the Board of Estimate was less active, it was sufficient under the cases to support conviction. See, e. g., *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 453 (1954); *United States v. Rabbitt, supra*, 583 F.2d at 1023; *United States v. Brown*, 540 F.2d 364, 376 (8th Cir. 1976). As one commentator has summarized the case law:

> "A defendant is deemed to have 'caused' a mailing if he could reasonably have foreseen it . . . . The only [additional] requirements are that the mailing must not occur after the scheme has reached fruition, and the mailing must not conflict with the scheme." Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J.Mar.L.Rev. 45, 51-52 (1980)."

Bronston argues that a decision upholding his conviction "would render every disloyal or ethically questionable

6. Bronston argues that count one of the indictment, which was based on the August 26, 1977, letter sent to the members of the Board of Estimate by Samuel Stein, must be dismissed because it had no material connection with the alleged scheme. We disagree. The jury was justified in finding that this letter, which was intended to publicly announce C & S's interest in presenting a plan for building and maintaining bus stop shelters, was a material element of the overall scheme to deprive BusTop of the renewal of its franchise. At the time the letter was written, it was the understanding of C & S officials that "the relationship between the City of New York and BusTop Shelters, Inc. is being reviewed at this time." Since the August 26 letter was intended to prevent BusTop from obtaining a quick, unopposed renewal of its franchise, it was clearly material to the overall scheme.

act which is accompanied by the mailing of a letter a crime." We disagree. Although a hypothetical can be posed in which one could be prosecuted for mail fraud on the basis of a breach of fiduciary duty accompanied by little more than a failure to disclose the breach to the person to whom the duty was owed, without any prospect of substantial economic harm to the victim, this is not such a case. Here we are faced with a straight-forward economic fraud in which the object of the scheme was not merely to deprive the victims of a law firm's undivided loyalty, for which they paid $52,000, but to deprive BusTop and its minority investors of the BusTop franchise. A partner in a law firm used the mails with the specific intent of defrauding one of his firm's own clients of the precise interest which it had been retained to defend. This falls within the ambit of the mail fraud statute.

We have examined Bronston's other claims of error and find them to be without merit. A reading of the trial transcript satisfies us that the district court's handling of the trial was fair and impartial. The jury was adequately charged that Bronston's good faith would be a complete defense and that the burden was on the government to prove lack of good faith beyond a reasonable doubt. The court properly excluded as irrelevant evidence of BusTop's non-performance of its bus shelter contract, which Bronston offered in support of his claim that he acted in good faith as a State Senator. The record is clear that Bronston did not disclose his officership in C & S or his relationship to it, under which he was to be paid for his services to C & S. Indeed, he received $12,500 from C & S's Chairman, Steinberg, which was repaid only after BusTop learned of Bron-

ston's letter to Richard Wells, Executive Assistant to New York City Comptroller Goldin, urging non-renewal of the BusTop franchise. Since the evidence at trial did not provide support for the contention that Rosenman Colin's representation of the BusTop investors was as limited in scope as Bronston maintains, the failure to so charge was not erroneous.

Judge Pollack's questioning of witnesses was for the proper purposes of clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings, all of which were within his responsibilities as trial judge. See *United States v. Robinson*, 635 F.2d 981, 986 (2d Cir. 1980); *United States v. Lamont*, 565 F.2d 212, 220 (2d Cir. 1977), *cert. denied*, 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978); *United States v. Bernstein*, 533 F.2d 775 (2d Cir.), *cert. denied*, 429 U.S. 998, 97 S.Ct. 523, 50 L.Ed.2d 608 (1976). He repeatedly advised the jury that he had no views as to the evidence and that they were not to draw any inferences as to his views from any of his comments or statements. *United States v. Boatner*, 478 F.2d 737, 741-42 (2d Cir.), *cert. denied*, 414 U.S. 848, 94 S.Ct. 136, 38 L.Ed.2d 96 (1973).

The exclusion of Freund's testimony regarding the ethical propriety of Bronston's conduct in promoting the interests of C & S was proper. Unlike Lindenbaum and Schneider who, as fact witnesses, testified to discussions with Bronston back in January 1978 regarding the impropriety of his representing C & S, which were relevant to Bronston's state of mind, Freund had had no contemporaneous conversations or dealings with Bronston with respect to the matter and did not discuss it with him until

after his conduct had been discovered by the BusTop investors, which obviously placed the Rosenman Colin firm in the embarrassing position of defending secret activities of a firm member, Bronston, which conflicted with the client's interests. Once Bronston's fraud had been exposed, although testimony by Freund as to Bronston's post factum self-serving declarations was inadmissible, Judge Pollack nevertheless permitted Bronston, who did not take the stand, to introduce a substantial amount of this self-serving hearsay through Freund. However, expert testimony by Freund regarding the ultimate question of whether Bronston's conduct amounted to a breach of fiduciary was clearly inadmissible. As a member of Bronston's own law firm Freund could hardly be labelled impartial. Moreover his testimony would in substance have conveyed nothing more to the jury than his "general belief as to how the case should be decided." *Marx & Co. v. Diner's Club, Inc.*, 550 F.2d 505, 510 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977). This was a matter within the jury's exclusive province.

The conviction is affirmed.

VAN GRAAFEILAND, Circuit Judge, dissenting:

Although I yield to no one in the strength of my conviction that lawyers should adhere to the highest ethical standards, *see, e. g., Cinema 5 Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976), I feel equally strongly that lawyers accused of crimes based on alleged unethical conduct are entitled to fair trials. Because of what I believe were prejudicial errors in the court below, I respectfully dissent.

The present mail fraud statute, 18 U.S.C. § 1341, is the successor to section 301 of the 1872 *Act to revise, consol-*

idate and amend the Statutes relating to the Post-Office Department, 17 Stat. 283, 323 (1872). While legislative history is sparse, what there is indicates that the statute was originally aimed at flimflam artists who use the mails to defraud the gullible. *Durland v. United States,* 161 U.S. 306, 314, 16 S.Ct. 508, 511, 40 L.Ed. 709 (1896); *United States v. Von Barta,* 635 F.2d 999, 1005 (2d Cir. 1980); Note, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions under the Federal Mail Fraud Statute,* 47 U.Chi.L.Rev. 562, 568 (1980). In contravention of the general rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity", *see United States v. Dixon,* 536 F.2d 1388, 1401 (2d Cir. 1976), *quoting Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971), section 1341 has been broadly interpreted to apply to fiduciaries who use their position for personal pecuniary gain. *Dixon, supra,* 536 F.2d at 1399; *United States v. Buckner,* 108 F.2d 921 (2d Cir.), *cert. denied,* 309 U.S. 669, 60 S.Ct. 613, 84 L.Ed. 1016 (1940). Where liability has been found, however, it was inevitably because the fiduciary relationship enabled the defendant to commit the wrongful acts for which he was convicted.

Where, as here, liability is predicated upon the vicarious fiduciary responsibility of an individual lawyer in a large, modern-day law firm and there is no evidence that the defendant exploited the vicarious relationship for personal gain, the statute should be applied with careful attention to its basic purpose.

> [T]o say that a man is a fiduciary only begins an analysis; it gives direction to further inquiry. To

> whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?

SEC v. Chenery Corp., 318 U.S. 80, 85-86, 63 S.Ct. 454, 458, 87 L.Ed. 626 (1943).

Courts and commentators dealing with individual conflict of interest claims in today's colossal law firms have struggled to avoid unfair, mechanically applied rules formulated at a time when such law firms as existed were small in size. *See, e. g., Armstrong v. McAlpin,* 606 F.2d 28 (2d Cir. 1979), *vacated by en banc court,* 625 F.2d 433 (1980), vacated —— U.S. ——, 101 S.Ct. 911, 66 L.Ed.2d 835 (1981); Note, *The Chinese Wall Defense to Law-Firm Disqualification* 128 U.Pa.L.Rev. 677 (1980); Anderson, *Conflict of Interest* 52 Wash.L.Rev. 807 (1977); Note, *Unchanging Rules in Changing Times; The Canons of Ethics and Intra-Firm Conflicts of Interests,* 73 Yale L.J. 1058 (1964). Differences of opinion among knowledgeable persons are not uncommon. When a man's freedom is at stake, these differences of opinion should be fully explored. I believe that the defense was unduly and unfairly hampered in this respect by the questions, rulings, and instructions of the trial court.

This is not a case in which the defendant took advantage of or used his fiduciary relationship with firm clients to do them harm. Judge Mansfield's statement that there was sufficient evidence to support an inference of "use of or manipulation of Bronston's breach of fiduciary relationship" is completely without support in the record. The Government took the position at the outset of the trial that

it was not required to prove that any confidential information was wrongfully utilized or leaked by Bronston, and the Government did not prove it. The Government did not even prove that there was information of a confidential nature that might have been wrongfully disclosed. Every witness who was queried on the matter testified that there was no misuse of confidential information. The prosecution did not say one word in support of this contention in summation, and the district court did not discuss it in its charge. Violation of 18 U.S.C. § 1341 could not be predicated upon misuse of confidential information; proof of other wrongful conduct was required.

The trial court told counsel and jurors on numerous occasions that whether or not there was a breach of ethics was not an issue in the case. I disagree. The essence of the crime of mail fraud is wrongful intent. *Pelz v. United States*, 54 F.2d 1001, 1005 (2d Cir. 1932). For there to have been a violation of the mail fraud statute, there must have been a "conscious knowing intent to defraud", *United States v. Kyle*, 257 F.2d 559, 564 (2d Cir. 1958), *cert. denied*, 358 U.S. 937, 79 S.Ct. 327, 3 L.Ed.2d 308 (1959), a conscious knowing violation of defendant's ethical fiduciary obligations. Evidence concerning the defendant's motives and his belief in the propriety of his conduct was material, because it might have tended to repel the inference of fraudulent intent. *Id.* at 563.

> [S]ince [intent] may be only inferentially proven, 2 Wigmore on Evidence §§ 300, 302, 3d Ed. 1940, no events or actions which bear even remotely on its probability should be withdrawn from the jury unless the

> tangential and confusing elements interjected by such evidence clearly outweigh any relevancy it might have.

United States v. Brandt, 196 F.2d 653, 657 (2d Cir. 1952).

Contrary to the district court's repeated assertions, the question whether defendant's conduct properly could be considered as conforming to the legal profession's Code of Professional Responsibility was squarely in the case as bearing upon the defendant's intent and good faith. This argument was made to the district court by defense counsel:

> There is a third ground, and that is it would bear on the witness' state of mind and his intention. If in fact it is reasonable to believe that what he is charged with doing was not a violation of a professional ethics, then I think that is certainly relevant to the issue of good faith which your Honor has recognized as a vital issue in this case.

The expert testimony which defendant sought to introduce should have been admitted for this purpose. *United States v. Garvin*, 565 F.2d 519, 522-23 (8th Cir. 1977). The district court's summary rejection of this testimony with the comment "We are trying a case, not a breach of ethics," was prejudicial error.

After having stressed to the jury that the ethical propriety of defendant's conduct was not an issue in the case, the district court interjected itself into the questioning of one of the Government's witnesses, and the following colloquy occurred:

> THE COURT: Now that the subject has been opened, I would like to know, as a member of the firm, was Mr. Bronston free to promote the mutually exclusive interests of a competitor of your client on the subject of the firm's engagement for the client?

MR. NIZER: I object to that, your Honor.
THE COURT: Overruled.
THE WITNESS: No, absolutely not
THE COURT: Why not?
MR. NIZER: Objection, sir.
THE COURT: Well, I will leave it for the jury to answer the question why not. I sustain your objection.
MR. NIZER: And I object to that comment, your Honor, as if—I won't say further. I move to strike it out.
THE COURT: What comment?
MR. NIZER: That you leave it to the jury to answer that question, as if the implication on that—
THE COURT: What you have objected to I have sustained you on. That is not being left to the jury.
MR. NIZER: I see.
THE COURT: There is no further implication.

This questioning by the district court dealt either with a breach of legal ethics or with the alleged violation of section 1341. It could have had no other purpose. In view of the trial judge's instructions that the jurors were not to be concerned with the question of ethics, they might well have concluded that the judge was pointing them to a clear statutory violation. If so, the judge's conduct was prejudiciously erroneous.

If, on the other hand, the question dealt solely with the ethics of defendant's conduct, it was part of an equally erroneous pattern. Although the judge permitted the prosecution to question several witnesses concerning the asserted unethical nature of defendant's conduct, he blocked defense counsel's efforts to prove the contrary. Having effectively stymied the defense on this issue, the

judge charged the jury as a matter of law that "[a] lawyer such as the defendant Jack E. Bronston has a duty not to act in any manner which is inconsistent with a client's interest." Thereafter, the court charged:

> I already have explained to you the concept of a lawyer's duties, fiduciary duties to you. You may consider a knowing breach of such duties by the defendant Jack E. Bronston if you find that such a breach occurred as evidence of intent to defraud.

The district court's emasculation of the defense of good faith did not stop there. Although the court charged the jury that good faith on the part of the defendant in urging competitive bidding was a complete defense, other rulings and instructions by the court made this a meaningless sop for the defense. The defense contended that what my colleagues term a "quick, unopposed renewal" of the Bus Stop franchise was in fact a "rip-off" of the people of the City of New York. The letter from the defendant to the City Comptroller, which was the linchpin in the Government's case, stated that Bus Stop was in default under its short-term contract with the City, that Bus Stop had built less than half of the shelters it had agreed to build, and had erected almost none of them in the disadvantaged areas of the Bronx. After this agreement had been terminated, Bus Stop attempted to push through a "quick, unopposed" twenty-year renewal without any competitive bidding by other companies.

Are my colleagues now prepared to say that if the "quick, unopposed" renewal of Bus Stop's contract had taken place, the City would not have been ripped off? I doubt it. Should not the jury have been given all the facts so that it could have made a fair, even-handed determina-

tion whether the defendant, a State Senator representing the Borough of Queens, was acting in good faith in attempting to prevent a rip-off? The jury was not given all the facts. The district court prevented it.

Defendant's letter stated that Bus Stop was in default under its contract. The truth or falsity of this statement goes directly to the heart of the Government's claim of bad faith. Where lies the truth? The jury doesn't know, and neither do we. Questions dealing with the impropriety and harmful effects of Bus Stop's conduct were held not to be pertinent. After sustaining the Government's objections to defense questions aimed at developing the facts, the court charged the jury:

> You must keep your attention riveted on the issue on trial. We are trying the terms of the indictment, the accusation. We are not trying here the question of which competitor was entitled to a franchise or on what terms, nor are we trying whether Bus Top Shelters, Inc. was or was not in compliance with the original agreement with the City. Those are not the matters you are here to decide. Don't be sidetracked thereby.

I suggest that the truth or falsity of defendant's letter was not a "sidetrack" but was a fundamental issue in the case. If the defendant acted with an honest intent to accomplish a laudable object, there was no crime. *Durland v. United States, supra,* 161 U.S. 306, 313-14, 16 S.Ct. 508, 511, 40 L.Ed. 709.

Since the jury was required to weigh defendant's bona fides with only half of the facts before it, I cannot agree with my colleagues that defendant had a fair trial.

I would reverse.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of August, one thousand nine hundred and eighty-one

Present:

HON. J. EDWARD LUMBARD
HON. WALTER R. MANSFIELD
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

No. 81-1015

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK E. BRONSTON,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby, ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

by /s/ Arthur Heller,
Deputy Clerk

FILED
Aug. 19, 1981

APPENDIX C

Order Denying Petition for Rehearing or, Alternatively, for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fourth day of November, one thousand nine hundred and eighty-one.

No. 81-1015

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JACK E. BRONSTON,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Jack E. Bronston,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

Appendix C

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
Clerk

by /s/ Francis X. Gindhart
Chief Deputy Clerk

FILED
Nov. 4, 1981

APPENDIX D

Judgment and Probation/Commitment Order

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket No. 80 Cr.00224-01(MP)

UNITED STATES OF AMERICA

v.

JACK E. BRONSTON

In the presence of the attorney for the government the defendant appeared in person on this date January 2, 1980

WITH COUNSEL Louis Nizer, Esq.

There being a finding/verdict of GUILTY

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully & knowingly, would and did devise & intended to devise a scheme & artifice to defraud, unlawfully, knowingly & wilfully would and did place and cause to be placed in post offices & authorized depositories for mail matter and would and did cause to be delivered by the United States Postal Service, according to the directions thereon, certain mail matter, to wit, letters. (Title 18, U.S. Code, Sections 1341 and 2.)

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as

charged and convicted and ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) YEARS, on each of counts one and two to run concurrently with each other and on condition that the defendant be confined in a JAIL TYPE INSTITUTION for a period of FOUR (4) MONTHS execution of the remainder of the prison sentence is suspended and defendant is placed on probation for a period of Two (2) YEARS, on each of counts one and two run concurrently with each other, subject to the standing probation order of this Court.

— and —

Costs of prosecution are awarded to the Government as a fine to be assessed and entered on the judgment as a committed fine. Bail pending appeal is continued on the condition that the defendant promptly prosecutes his appeal in accordance with the rules of this Court and the rules of the Court of Appeals for this Circuit.

The Court orders commitment to the custody of the Attorney General and recommends,

/s/ U.S. District Judge Milton Pollack
Date January 2, 1981

A TRUE COPY
RAYMOND F. BURGHARDT
CLERK

By /s/ E. Moroney
Deputy Clerk

FILED
Jan. 2, 1981

APPENDIX E

Opinion of District Court Denying Motion to Dismiss

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 80 Cr.00224-01(MP)

July 2, 1980

UNITED STATES OF AMERICA

v.

JACK E. BRONSTON

William M. Tendy, Chief Asst. U. S. Atty., S. D. New York, for United States by Patricia M. Hynes, Asst. U. S. Atty., New York City.

Phillips, Nizer, Benjamin, Krim & Ballon, New York City, for defendant by Louis Nizer, Angelo T. Cometa, Shiela G. Riesel, New York City.

MEMORANDUM

MILTON POLLACK, District Judge.

Defendant Jack E. Bronston moves, pursuant to Fed.R. Crim.P. 12(b), for dismissal of the indictment. For the reasons given hereafter, the motion will be denied in all respects.

Briefly stated, the indictment charges Mr. Bronston, who is a lawyer, with having violated the mail fraud statute, 18 U.S.C. § 1341, by promoting the interests of Convenience and Safety Corporation ("C & S") in its quest for the bus shelter franchise from the City of New York and in attempting to block BusTop Shelters Inc., the then-holder of the franchise from obtaining an impending long term renewal thereof.

In 1977 BusTop needed additional capital. Fifty Third Street Ventures, Inc. and FNCB Capital Corp. agreed to invest in BusTop. These two groups are the core of the "minority investors" referred to in the indictment. Beginning in approximately June 1977, the law firm of which Mr. Bronston was a member undertook the representation of the minority investors in BusTop in respect of their investment of capital in BusTop. The law firm directly billed BusTop for legal services rendered on behalf of that company's minority investors and these bills were paid to the law firm by BusTop.

Mr. Bronston's promotion of C & S's interests, it is alleged, occurred at and during the same times as his law firm was actively representing the adverse interests of the minority investors of BusTop. The indictment charges that Mr. Bronston knowingly breached the fiduciary duty he owed the minority investors represented by his firm, in pursuance of a scheme to defraud them.

Defendant's primary argument is that the indictment fails to allege a mail fraud because it does not charge in *haec verba* that the defendant used the alleged breach of duty in the scheme set forth. No authority has been or can

be pointed out which requires that "use of fiduciary position to further the scheme" *must* be charged in that language in the indictment. Rather, allegations as are set forth in the instant indictment of using the mails in a knowing breach of fiduciary duty committed in furtherance of a scheme to defraud and with the intent to defraud are sufficient to sustain an indictment under the mail fraud statute. *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir. 1979); *Post v. United States*, 407 F.2d 319, 329 (D.C.Cir. 1968), *cert. denied*, 393 U.S. 1092, 89 S.Ct. 863, 21 L.Ed.2d 784 (1969).

The Government has stated in response to defendant's arguments that it will prove that defendant actually participated in his firm's representation of the minority investors in BusTop; that defendant was privy to confidential information; and that defendant knowingly used his fiduciary position in advising C & S and in promoting its interests in pursuance of the scheme alleged in the indictment. These evidentiary details are adequately embraced in the reasonably specific allegations of the indictment in paragraphs 7 through 10, which link the fiduciary breach with the requisite alleged intent to defraud. The indictment "contains the elements of the offense intended to be charged" in adequate factual detail to "apprise the defendant of what he must be prepared to meet," and thus is facially sufficient. *Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1961).

Whether the allegations of the indictment will hold up factually when tested in the crucible of a trial at which the witnesses will be heard, the issues of motive and intent ex-

amined and cross-examined, and documents adduced and assayed, is not the question to be answered at this time. Perhaps a jury might accept the views set forth by defendant's counsel in his affidavit and at oral argument, but surely it is not required to; perforce, the legal sufficiency of the indictment may not be evaluated by comparing it with defendant's exemplary life long character traits.

Defendant's other contentions can be dealt with briefly. The mail fraud statute has repeatedly withstood attacks on the ground of unconstitutional vagueness and the facts alleged in this indictment do not warrant a different result herein. *See, e. g., United States v. Condolon,* 600 F.2d 7 (4th Cir. 1979).

Nor is the indictment subject to dismissal on hearsay assertions of prosecutorial threats, leaks, protests and allegedly contrived conduct. The suppositions concerning the scope of the presentation to the Grand Jury likewise present nothing of substance to impugn the indictment.

The suggestion that portions of the indictment should be trimmed out as surplusage, inflammatory or prejudicial is inapplicable to this prosecution. It cannot fairly be said at this point of the case that the matter to which the defendant objects in the recitals of the indictment is either inadmissible or prejudicial.

The suggestion that the grand jury's attendance charts be examined by the Court, calls for a scrutiny that is legally unnecessary under the settled law of this Circuit. Whether 12 grand jurors voting the indictment heard all the evidence raises no flaw in the indictment. *United States v. Colasurdo,* 453 F.2d 585, 596 (2d Cir. 1971), *cert. denied,* 406

U.S. 917, 92 S.Ct. 1766, 32 L.Ed.2d 116, *citing United States ex rel. McCann v. Thompson,* 144 F.2d 604 (2d Cir.), *cert. denied,* 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944).

The defendant's motion to dismiss the indictment is in all respects denied.

So ordered.

Opposition

Office - Supreme Court, U.S.
FILED
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No. 81-1441

In the Supreme Court of the United States

OCTOBER TERM, 1981

JACK E. BRONSTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was properly convicted of mail fraud, in violation of 18 U.S.C. 1341.

2. Whether petitioner was deprived of a fair trial because the court excluded certain evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 658 F. 2d 920.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1981 (Pet. App. 31a-32a). A petition for rehearing was denied on November 4, 1981 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on February 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to concurrent terms of four

months' imprisonment and two years' probation. The court of appeals affirmed.

The evidence at trial established that in the spring of 1977 BusTop Shelters, Inc. ("BusTop") was negotiating with the City of New York for a 20-year renewal of its franchise to build and maintain bus stop shelters. In an effort to raise capital, BusTop approached Citicorp Venture Capital Limited ("Venture Capital") and Fifty-Third Street Ventures, Inc. ("53d Street Ventures"), which were interested in making a substantial investment (Pet. App. 3a).

On June 1, 1977, Venture Capital and 53d Street Ventures ("the investors") contacted Samuel Lindenbaum, a partner in the law firm of Rosenman, Colin, Freund, Lewis & Cohen ("Rosenman"), and then retained the firm to advise them regarding the investment (Pet. App. 2a-3a). The investors made it clear to Rosenman that the success of their investment depended on BusTop's obtaining a renewal of its franchise (C.A. App. 457-459, 82-83).[1] On August 16, 1977, an investment agreement was reached. The investors were to invest $1,350,055 over a period of time; in return, they would receive a 30% ownership interest in BusTop and the right to designate three members of BusTop's seven-member board of directors. The Rosenman firm was to continue its representation of the investors (Pet. App. 6a-7a; C.A. App. 454-457, 525, 533, 550; Gov't Exh. 19, Tab 20, § 11.01).[2]

On May 17, 1977, petitioner, another partner in the Rosenman firm, had informed Lindenbaum that petitioner's friend Saul Steinberg wanted to retain the firm regarding

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

[2] "Gov't Exh." refers to the government's exhibits in the trial court. "Tab" refers to an attachment to Gov't Exh. 19.

the franchise. Although the firm was not yet representing the investors, Lindenbaum declined because he was a close friend of BusTop's public relations consultant and its attorney (Pet. App. 3a-4a).

Petitioner nevertheless directed a Rosenman associate to set up a corporation known as the Convenience and Safety Corporation ("C&S") (Pet. App. 4a), and to bill his time to the Reliance Group, a Steinberg conglomerate (C.A. App. 75, 299). In requesting his senior partner, Murray Cohen, to assign an associate to this task, petitioner had said that the project was a private venture related to the Reliance Group for which Steinberg wanted to have a corporation organized (C.A. App. 76-77). In fact, C&S was Steinberg's entree to the bus shelter business. C&S was incorporated on June 2, 1977 (Pet. App. 4a).

On June 9, 1977, petitioner, aware that the BusTop investors had retained Rosenman, suggested to the firm's business committee that the firm represent C&S. Murray Cohen, a member of the committee, replied: "We should not do anything further on this until [Lindenbaum], you and I talk about it. There is a definite conflict." Cohen thereafter told petitioner that their client (the investors) was about to invest over $1,300,000 in BusTop, and that they would jeopardize their client's financial investment if they also represented C&S (Pet. App. 4a-5a; C.A. App. 77-81, 86, 1304).

Still later, on July 5, 1977, petitioner asked Cohen to assign a client billing number to C&S "just in case at some time in the future something developed in which there was not a conflict." Cohen assented, on the condition that petitioner perform no services on behalf of C&S without obtaining Cohen's prior approval. Petitioner himself noted this restriction in a memorandum to the firm's bookkeeper (Pet. App. 5a).

Petitioner tried a third time to get Rosenman to represent C&S on December 7, 1977. In a memo to Cohen on that date, petitioner urged the firm to represent C&S nationwide, outside New York City. Petitioner stated that BusTop was interested solely in the New York City franchise. In fact, BusTop was seeking franchises across the country (Pet. App. 6a n.2; C.A. App. 211-213). Cohen instructed petitioner on January 12, 1978, that the firm could not represent C&S even outside New York City. Petitioner then admitted that he was working on a C&S project in Newark, for which he had not received Cohen's approval, but which had to be completed in a matter of days. Petitioner was allowed to complete the project, but was told to do nothing thereafter for C&S anywhere in the country (Pet. App. 6a n.2; C.A. App. 104, 386-387, 518-519).

Though the Rosenman firm repeatedly refused to represent C&S, petitioner was secretly assisting C&S to obtain the New York City bus shelter franchise. He served as a corporate officer (Assistant Secretary) of C&S (Pet. App. 7a) and was also a close confidant of C&S's Chairman, Saul Steinberg, to whom he was "personally devoted" (C.A. App. 356, 656, 852, 1334-1335). Petitioner recorded many of his C&S activities, including numerous meetings and telephone conferences with Steinberg. Petitioner's billing notes indicate charges to C&S for 15 conferences with Steinberg (Pet. App. 7a). He also made regular notes to bill for similar conferences with Henry Silverman, the president of C&S, and others who supported C&S's franchise application. Many of these conferences occurred on dates that coincided with critical phases in the City's decision-making process concerning the franchise (*id.* at 7a-9a, 10a; C.A. App. 1310-1318).

Petitioner used his position as a Rosenman partner to enhance his value as a Steinberg confidant. Petitioner talked with Lindenbaum on several occasions about BusTop's efforts to get the franchise. Lindenbaum was meeting

regularly with the investors and the owners of BusTop (Pet. App. 8a). During his conversations with Lindenbaum, petitioner concealed the true nature of his interest in the matter (C.A. App. 356-357, 380). Lindenbaum, unaware of petitioner's dual role, spoke freely with him, and in fact billed three of these conferences to the BusTop investors (Pet. App. 8a; C.A. App. 1294, 1298, 1300). Petitioner, on the other hand, made a note to bill C&S for an hour spent reporting to Steinberg on one of his conferences with Lindenbaum (Pet. App. 8a). Petitioner also noted to bill C&S for a telephone conference with Lindenbaum (C.A. App. 1308). The conferences petitioner had with Lindenbaum occurred at times critical to the awarding of the New York City franchise (Pet. App. 8a-9a).

For more than a year after he was told by Rosenman that he could not represent C&S, petitioner attended meetings to develop C&S's franchise proposal (Pet. App. 8a; C.A. App. 806-807). Petitioner also worked closely with Stein, Rosen & Ohrenstein, the law firm eventually retained by C&S. The Stein firm sent documents to petitioner concerning the franchise bid, and petitioner participated in conference calls or meetings that the Stein firm billed to C&S (Pet. App. 8a; C.A. App. 639-642, 655, 671-674, 701, 1347-1348).

Petitioner also made telephone calls to, and wrote or reviewed letters to, public officials, advocating C&S's cause and urging the City not to award BusTop the franchise. Petitioner noted in his diary to bill C&S for those letters and phone calls. At an August 25, 1977, meeting petitioner attended with attorneys from the Stein firm, it was decided that C&S would send a letter to the New York City Board of Estimate to announce C&S's interest in the bus shelter franchise. A Stein firm attorney drafted the letter, which petitioner then reviewed and approved.[3] Petitioner made a

[3]This letter was the basis for count one of the indictment (Pet. App. 9a).

note to bill C&S for his services regarding the letter (Pet. App. 9a).

Petitioner also mailed to Richard Wells, the Executive Assistant to the New York City Comptroller, a C&S memorandum he received from Henry Silverman on October 27, 1977. Petitioner, who was also a New York State Senator, wrote his letter to Wells on official Senate stationery, without disclosing his connection to C&S. In it he criticized BusTop and urged that "a renewal of [its] franchise would not appear to be in the public interest." Petitioner then attached a copy of the C&S memorandum, altered to eliminate all references to C&S as the source of the statistics and opinions, but retaining verbatim the derogatory comments about BusTop. This letter, dated October 28, 1977, was typed and mailed by a Rosenman secretary.[4] Petitioner's diary for that date notes to bill both for a meeting with Steinberg and a "letter to Richard Wells" (Pet. App. 10a-11a).

On December 9, 1977, petitioner sent Steinberg a letter detailing his time charges to date and saying he would not ask for payment "until you and your partners decide on a format through which this can be done" (Pet. App. 11a). Petitioner could not, however, bill through Rosenman, since the firm's billing committee, Murray Cohen and Max Freund, carefully monitored each bill, even calling in daily when out of town to review bills (C.A. App. 984). On June 28, 1978, petitioner received a personal check from C&S's Chairman, Saul Steinberg, for $12,500. This amount was identical to the fee which petitioner had estimated Rosenman would have billed C&S in 1978, had Rosenman accepted the representation (Pet. App. 11a-12a).

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[4]This letter was the basis for the second count of the indictment (Pet. App. 10a).

The court of appeals, affirming petitioner's conviction, held that a breach of fiduciary duty, standing alone, would not necessarily constitute mail fraud. It concluded, though, that the government had succeeded in proving a violation because it had also shown that petitioner concealed material facts from his clients, the BusTop investors; that petitioner had a specific intent to defraud; that the scheme to defraud was designed to inflict actual economic harm on the BusTop investors; and that petitioner used the mails in furtherance of his scheme (Pet. App. 13a-20a). Judge Van Graafeiland dissented, principally on the ground that the trial court had improperly excluded evidence bearing on petitioner's good faith (*id.* at 24a-30a).

ARGUMENT

1. Petitioner contends (Pet. 8-19) the court of appeals erred in holding that his breach of fiduciary duty to his clients, the BusTop investors, could violate the mail fraud statute even if it did not involve misuse of confidential information, or affirmative misrepresentation, and did not cause any economic injury. This contention is without merit.

The courts have uniformly held that the mail fraud statute extends to breaches of fiduciary duty like that involved in this case, and this Court has consistently declined to review those decisions.[5] In such actions, the offense is established if the government proves that the defendant failed to

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[5]See *United States* v. *Barta*, 635 F. 2d 999, 1005-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F. 2d 1167, 1170-1173 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F. 2d 1347, 1361-1364 (4th Cir. 1979), vacated on other grounds, 602 F. 2d 653 (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Bush*, 522 F. 2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Keane*, 522 F. 2d 534, 546, 549 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Bryza*, 522 F. 2d 414, 421-423 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *Isaacs*, 493 F. 2d 1124, 1149-1150 (7th

disclose material information when he was under a duty to do so, and used the mails to execute his fraudulent scheme in contemplation of causing harm.[6]

Under these principles there was overwhelming proof of petitioner's guilt. Petitioner had a fiduciary obligation to provide his client, the BusTop investors, his undivided loyalty. He had a duty to disclose fully any personal interests he had adverse to theirs, and all material facts that might affect his client (Pet. App. 15a-16a). Notwithstanding these obligations, petitioner never revealed to the investors, to BusTop, or to his partners that he was a corporate officer of C&S; that he was regularly conferring with Steinberg on C&S matters; that he was working closely with C&S's counsel, Stein & Rosen; that he was consulting with C&S on policy matters; that he was writing and telephoning public officials on behalf of C&S; and that he was noting to bill C&S for these services. Most significantly, petitioner never revealed that he received a check from Steinberg, C&S's Board Chariman, for $12,500, an amount identical to that which petitioner had estimated as C&S's legal fees were Rosenman to have undertaken the representation.[7]

Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *States*, 488 F. 2d 761, 764-766 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F. 2d 508, 512-514 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

[6] *United States* v. *Newman*, 664 F. 2d 12, 19-20 (2d Cir. 1981); *United States* v. *Barta*, *supra*, 635 F. 2d at 1005-1007 & n.14; *United States* v. *Bohonus*, *supra*, 628 F. 2d at 1172; *United States* v. *Mandel*, *supra*, 591 F. 2d at 1363-1364; *United States* v. *Brown*, 540 F. 2d 364, 374-375 (8th Cir. 1976); *United States* v. *Bryza*, *supra*, 522 F. 2d at 422; *United States* v. *Isaacs*, *supra*, 493 F. 2d at 1149-1150; *United States* v. *States*, *supra*, 488 F. 2d at 764-766; *United States* v. *George*, *supra*, 477 F. 2d at 512-514. See also *Chiarella* v. *United States*, 445 U.S. 222, 228, 235 (1980).

[7] Even if one were to accept petitioner's argument that a misuse of confidential information—rather than a failure to disclose material information—was required to prove a violation of the statute, it would

Not only did petitioner fail to disclose material facts, but his scheme was designed and was likely to produce significant economic harm to his client, the BusTop investors. As the court of appeals stated (Pet. App. 19a), "in addition to the prospective harm the clients faced from BusTop's potential loss of the franchise, they suffered actual loss to the extent of paying the Rosenman Colin firm as their counsel $52,000 for undivided loyalty which they did not receive."

2. Petitioner also contends (Pet. 19-24) that he was deprived of a fair trial because the court excluded evidence bearing on his defense. In essence petitioner claims that his efforts to prevent his client from getting the bus shelter franchise were made in good faith, in pursuance of his senatorial duties. This contention is without merit.

a. We note at the outset that the district court instructed the jury that good faith was a "complete defense," that the government had the burden of proving lack of good faith beyond a reasonable doubt, and that—if motivated sincerely by considerations of the public interest—petitioner as a state senator lawfully could have urged competitive bidding for the bus shelter franchise (C.A. App. 1248-1249). These instructions fairly and accurately presented the defense theory to the jury (Pet. App. 21a). Petitioner nevertheless argues (Pet. 20) that the court improperly excluded evidence about whether his October 28, 1977, letter criticizing BusTop's performance was accurate. Petitioner does

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not advance petitioner's cause. There was ample evidence that petitioner used his partnership position and privileged client information to further C&S's bid for the New York City franchise. For example, petitioner conferred on several occasions with Lindenbaum, who was in direct contact with the investors and principals of BusTop, and Lindenbaum billed those conferences to the BusTop investors. Petitioner, on the other hand, made notes to bill C&S for reports to it of his conversations with Lindenbaum (Pet. App. 8a).

not point to any specific evidence that was improperly excluded. This contention, accordingly, does not warrant further review.

b. Nor is there merit in petitioner's contention that the district court erroneously excluded expert testimony about whether petitioner breached his fiduciary duty.

Max Freund, a senior partner in petitioner's law firm, was called by the petitioner to give "his opinion and his reaction and observation of [petitioner's] conduct and the ethical nature of it" (C.A. App. 897) and to testify as an "unbiased" expert witness on whether petitioner's conduct involved any conflict of interest or breach of fiduciary duty (C.A. App. 898-900). Freund had no firsthand knowledge of the facts and was hardly an impartial third party (Pet. App. 22a-23a). The trial court has considerable discretion whether to admit opinion testimony, and its decision here was not an abuse of discretion. *United States* v. *Benveniste*, 564 F. 2d 335, 339 (9th Cir. 1977); *United States* v. *Bermudez*, 526 F. 2d 89, 97-98 (2d Cir. 1975), cert. denied, 425 U.S. 970 (1976); *Spitzer* v. *Stichman*, 278 F. 2d 402, 409 (2d Cir. 1960).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1982

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